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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 19, 1999

EX PARTE

Chairman William E. Kennard
Federal Communications Commission
The Portals Building
445 12th Street, SW
Washington, D.C. 20554

Re: CS Docket No. 95-184

Dear Chairman Kennard:

As General Counsel of OpTel, Inc. ("OpTel"), which is an alternative multichannel video programming distributor ("MVPD"), I read with interest the Commission's most recent video competition report.¹ From the perspective of a competitor in the multiple dwelling unit ("MDU") sub-market of the larger MVPD market, the latest competition report has a number of important implications.

First, OpTel was encouraged by the Commission's recognition of the importance of the MDU sub-market. MDUs comprise approximately 28% of the total housing units nationwide and represent an "important segment" of the MVPD market.² Further, whereas MVPD markets in general remain highly concentrated, there are a number of new entrants seeking to provide competitive video programming services to MDUs.

In this regard, it is important that the Commission complete the second phase of its "inside wiring" rulemaking, in which a number of issues critical to the continued growth of competition in the MDU video sub-market await resolution.³ One of the issues ripe for decision is the competitive impact of long-term exclusive contracts between franchised cable operators and MDUs. As the Commission

¹ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 98-102 (rel. Dec. 23, 1998).

² Id. ¶ 129.

³ Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Consumer Protection and Competition Act of 1992: Cable Home Wiring, CS Docket No. 95-184, MM Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking (rel. Oct. 17, 1997).

recognized in its latest competition report, these contracts discourage potential entry and limit the growth of competition. For that reason, OpTel has advocated application of the Commission's "fresh look" policy to franchised cable perpetual service contracts.⁴ "Customers locked into long-term contracts with an entrenched monopolist should be able to gain the benefits of a new, more competitive marketplace once alternative MVPDs are present.

On the other hand, Commission should not artificially limit the duration of any service agreement that a new competitor, which enters the market to compete with a dominant franchised cable operator, may negotiate. By definition new entrants do not have market power and they cannot coerce or compel customers to accept unfavorable contract terms based on unequal bargaining power. Indeed, any cap on the duration of contracts negotiated by alternative providers would simply discourage entry and slow the development of competition.

Second, you noted in your separate statement on the competition report that you would like to work with Congress to amend the OTARD rules in order to encourage increased competition in the MVPD markets. To that end, the Commission and private cable companies jointly can bring to Congress' attention that private cable MVPDs, who use microwave antennae to deliver video programming to MDUs, are conspicuously left out of the OTARD rules. As a matter of regulatory parity, if nothing else, one group of alternative MVPDs (*e.g.*, DBS and MMDS providers) should not be afforded special protections for their antennae that are not available to other MVPDs, such as private cable operators. More importantly, by extending OTARD coverage to private cable operators, the federal government would help to remove local impediments to microwave antenna placement that have proven to be a significant barrier to competition in many markets.

We at OpTel look forward to working with you and the staff at the FCC on these issues as the year progresses.

Respectfully,


Michael E. Katzenstein

Vice President and General Counsel

cc: Magalie R. Salas
Deborah Lathen
Louis Brunel — OpTel, President & Chief Executive Officer
Steven Dubé — OpTel, Chief Operating Officer

⁴ See, *e.g.*, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, Comments of OpTel (filed Sept. 27, 1996).

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